Filed 11/14/16 In re Mark M. CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re MARK M., Jr., et al., Persons Coming Under the Juvenile Court Law.	B267470 (Los Angeles County Super. Ct. No. CK99531/CK54018)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. MARK M., Sr., Defendant and Appellant.	ORDER MODIFYING OPINION [NO CHANGE IN JUDGMENT]

THE COURT:*

It is ordered that the opinion filed herein on November 2, 2016, be modified as follows:

1. On pages 37 and 38, this portion of the DISPOSITION is deleted:

"The orders sustaining the section 300 petitions and removing Mark from father's custody are reversed and that portion of the case is remanded to

the juvenile court with directions to order DCFS to further investigate Mark's claimed Navajo ancestry. Thereafter, the court shall make a finding whether the ICWA applies and direct that notice be given to the appropriate tribe. If, after proper notice, a tribe determines Mark is an Indian child as defined by the ICWA, the juvenile court shall proceed in conformity with the provisions of the ICWA. If no tribe indicates the child is an Indian child, the court shall reinstate the orders on the section 300 petition."

2. The following words are inserted in their place:

"The juvenile court's jurisdictional findings are affirmed. The June 23, 2015 disposition order regarding Mark is remanded for the sole purpose of compliance with the notice provisions of the ICWA. If it has not already done so, the juvenile court is directed to order DCFS to further investigate Mark's claimed Navajo heritage, and if required, notify the designated tribe or tribes, Bureau of Indian Affairs, and Secretary of the Interior, and to submit all notices and signed return receipts to the juvenile court. If a tribe indicates Mark is an Indian child within the meaning of the ICWA, the juvenile court shall proceed in compliance with the ICWA."

This modification effects no further change in the court's orders.

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*WILLHITE, Acting P. J. MANELLA, J. COLLINS, J.

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LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. MARK M., Sr., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Patricia Spear, Judge and Robin Kesler, Referee. Affirmed in part, reversed in part and remanded with instructions.

Joseph T. Tavano, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Acting Assistant County Counsel, and Jeanette Cauble, Principal Deputy County Counsel, for Plaintiff and Respondent.

Mark M., Sr. (father), appeals from juvenile court orders sustaining dependency jurisdiction over his two minor children: Mark M., Jr., born August 2014, whose mother is G. A., and Alisha M., born January 2005, whose mother is Caroline M.,[1] and removing Mark from his custody. Jurisdiction was sought over the children based primarily on allegations that father and G. (collectively, the parents) sexually abused Gennice's sons–Mark's half-brothers (four–year–old Evan P. (born November 2008), and six–year–old Ayden P. (born May 2007; collectively "the boys"). Father asserts that the dependency court erred in admitting the boys' out–of–court statements regarding the sexual abuse, once the boys were found not competent or unavailable to testify at trial, and could not be cross-examined. Father further asserts there is no substantial evidence to support the court's findings that he physically abused the boys, engaged in domestic violence with G., has a current drug problem, that his children are at serious risk of physical harm or sexual abuse or that Mark must be removed from his custody. Finally, father contends that respondent Department of Children and Family Services (DCFS) failed to comply with the notice provisions of the Indian Child Welfare Act, 25 United States Code section 1901 et seq. (ICWA). DCFS agrees that notice was inadequate.

We agree that DCFS failed to comply with ICWA and remand the matter, with directions to the juvenile court to ensure DCFS's compliance

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1 Neither mother is a party to this appeal.

with ICWA notice requirements. We affirm the juvenile court's orders in all other respects.

FACTUAL AND PROCEDURAL BACKGROUND

Father is the presumed father of Alisha and Mark, the two minor children who are the subjects of this appeal.[2] G. A., father's live-in companion, is Mark's mother and the mother of his half-brothers, Ashton P. (August 2011), Evan and Ayden. Ashton has lived with M. Rodriguez, an acquaintance of G., who purportedly left Ashton in Rodriguez's care when he was three-weeks-old. In 2013, Ayden and Evan were living with father and G. (collectively, the parents). Alisha lived with her mother until she was placed in foster care during this proceeding.

The Dependency Proceeding Involving Ayden, Evan and Ashton

In May 2013, DCFS filed a Welfare and Institutions Code section 300[3] petition, on behalf of Ashton, Ayden and Evan, alleging that the parents physically abused the two older boys by striking them with belts and engaged in physical altercations in their presence. Ayden and Evan told DCFS they feared father, who hit them with his hand or with a belt. The boys also told the social worker that the parents regularly engaged in domestic violence,

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[2] Father is also the father of Stella M., who is not a juvenile court dependent, and Violet M., who once was, based on allegations unrelated to this appeal. Father's parental rights to Violet were terminated in July 2011, and she was adopted.

[3] Undesignated statutory references are to the Welfare and Institutions Code.

and they had seen father punch G. in the stomach with a closed fist and push her up against the sink. Ayden said the parents argued regularly and pushed one another around.

Father denied the allegations. He told DCFS that he and G. took "good care of [their] kids," and he considers Ayden and Evan to be his sons. He admitted having spanked the boys with a belt, but saw nothing wrong with corporal punishment. Father also told the social worker that he drank between one and "several" 24-ounce cans of beer daily. G. admitted to a personal history of illicit drug use, but denied the allegations of domestic violence.

Ayden, Evan and Ashton were detained and placed in Rodriguez's care. DCFS amended the petition to add allegations of alcohol abuse by father. The petition was sustained in May 2015. (§ 300, subd. (b).)

The Boys' Placement in Rodriguez's Home and Disclosures of Sexual Abuse

From the time he was first placed in Rodriguez's care, Evan engaged in physically aggressive behavior towards both his brothers, which progressively worsened. In December 2013, Rodriguez found five-year-old Evan and seven-year-old Ayden in bed together. They were naked and touching one another. Rodriguez made three referrals to DCFS after the boys began making numerous disclosures of sexual abuse by father and G., and continued to act out in sexually inappropriate ways. DCFS investigated the referrals and deemed them unsubstantiated, but not unfounded.

In April 2014, Rodriguez made a referral to DCFS after the boys continued disclosing additional incidents and details of sexual abuse by the parents. At first, the boys felt most comfortable making disclosures to Rodriguez's mother, Rosalinda G., who also lived in Rodriguez's home. The

boys provided such overwhelming, detailed descriptions of the parents' sexual abuse that Rodriguez had given them journals to record their accounts of what happened, and to share with their therapists.

Among other things, the boys reported that G. made them touch her private areas. Rodriguez told DCFS that Evan (who was not yet able to write) had drawn a picture in his journal which he said depicted father "touching" him, and said that when father touched Evan inappropriately the parents also made Evan touch G. "on her weenie." He told Rodriguez that his mother's "weenie" had a hole, and that was where he stuck his fingers. Evan also said the parents insisted that he be in their room when they were "sexing." A social worker who interviewed the boys privately received information consistent with what they told Rodriguez and, later police and forensic investigators.

Ayden reported that father and G. made him and Evan smoke cigarettes and drink beer. He said father used his finger to touch Ayden's "butt," and made Ayden touch father's "butt" while G. watched. In one journal entry he shared with DCFS, Ayden wrote that the parents were in their bedroom doing "nasty things," and G. called him into the bedroom and told him to take off his clothes. G. touched Ayden's butt, while father inserted his "winnie"[4] into Ayden's butt, making it bleed. Another journal entry disclosed an incident during which father instructed the boys to remove their clothes and engage in sex with one another. Ayden said both boys had cried. His journal also contained entries describing incidents during which G. performed oral sex on him, during which he engaged in sex with her when

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4 The boys' term for a "weenie," or penis.

father was not present, and others when the parents forced him to orally copulate father. Ayden was uncomfortable discussing the incidents about which he had written in his journal with the social worker.[5]

Evan's journal–which he also shared with the social worker–contained similar and detailed entries of sexual abuse by the parents.[6] They included incidents during which Evan claimed father had inserted his "winnie" and finger in Evan's butt, and during which G. put her tongue and finger inside Evan's butt. Evan also said that father hit him with a belt on his scrotum ("nuts"), hands and cheeks, pulled his hair and threatened to hit him with a belt if he did not perform oral sex on him. Evan disclosed incidents when father made him touch father's "winnie," which was long, and when G. engaged in "sexing" knowing that Evan was watching, put her mouth on his penis, and when she made him touch her "che ches." Evan also reported that father touched Evan's private parts while G. watched. Father danced naked and made Evan watch, and he watched Evan when he was in the bathroom, and showered with Ayden. Evan also reported that father had "sexed" the boys, that blood was coming out and the boys both had cried.

Evan reported the parents' sexual abuse to his maternal grandmother (MGM), who told him not to tell anyone. Evan also said that both Alisha and Stella (not just Stella) were also sexually abused by the parents. He told the social worker he was afraid the parents were "going to hurt the baby [Mark],"

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5 Ayden also told DCFS that, during a visit to father's home, the parents had called Stella into their room and, as she later told him in tears, made her drink and smoke and sexually abused her. Stella denied any sexual abuse.

6 Rosalinda recorded what Evan told her in his journal in his own words because Evan could not yet write.

and asked her to "[p]lease let '[Rodriguez]' have that baby. Please don't forget to do that."

In August 2014, the court terminated reunification services as to Evan, Ayden and Ashton, and ordered permanent placement services for all three boys.

The Police Investigation Report

DCFS referred the matter to the Pomona Police Department (PPD), which conducted a criminal investigation in May 2014. The PPD report indicates that Evan (Victim No. 1) was able to provide information that a typical five-year-old child would not know. He told the investigating officer that G. had instructed him to touch her "weenie," and put her fingers inside his and Ayden's butts, all of which happened at the parents' house. Evan was very willing to talk, and "spontaneously" told the officer that G. "wanted me to sex her." The child (who was not yet able to write) spelled the gibberish word "BYSSO" to explain what he meant. Evan told the officer that father was bad: he came home from work, hit the boys on their butts and "weenies," and often asked them to put their fingers in his butt. He also said father was a liar, but did not explain why. Evan said G. told the boys not to tell anyone, including Rodriguez, what father had done. Evan identified his private parts for the investigating officer. During the interview, he played with three stuffed bears of varying size. He labeled one bear father, one G. and the smallest one was him. He then placed the bear he called Evan on top of the one labeled G. and moved it in a sexual manner.

Ayden (Victim No. 2), was also able to identify the location of his private parts for the investigating officer. He told the officer that father touched his (Ayden's) penis, and would make Ayden touch father's private

parts. G. saw what happened and also participated in touching Ayden's private parts. These incidents occurred primarily inside the parents' home. Ayden said that Evan often watched and would touch Gennice's private parts. Ayden said the parents would do "nasty stuff" in the bedroom, then call him and Evan into the room. When asked what had happened next, the investigating officer observed that Ayden "seemed to be very bothered by this and appeared to be sad," and told the officer it was in the book (his journal). The officer observed that Ayden was obviously affected by the incidents, which were difficult for him to discuss, and noted that a forensic interview could reveal more information and possible crimes that had been committed. The boys participated in forensic interviews in May and September 2014.

Mark's Case

In June 2014, G. was arrested during a probation sweep at father's home, and served two months in jail. Police found a scale and methamphetamine, and father was also arrested. G. was transferred to a substance abuse program and, on August 28, gave birth to Mark. After interviewing the parents at the hospital, the social worker was satisfied they were progressing in their respective programs, and released Mark to Gennice's care.

On September 4, 2014, DCFS received another referral from Rodriguez regarding the parents' alleged sexual abuse.

On September 9, 2014, based on the boys' newest disclosures of sexual abuse by the parents, coupled with earlier allegations of the parents' physical abuse and domestic violence, DCFS filed a section 300 petition on behalf of newborn Mark. Both parents denied the allegations of sexual abuse of the boys. The petition was later amended to add allegations that the parents had

long-standing histories of illicit drug use, that father was a registered drug offender and that G. was undergoing treatment for drug abuse.[7]

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[7] As ultimately sustained in May 2015, the amended petition alleged:
"b-1, d-1, j-1: [Mark's parents] . . . engaged in sexual intercourse in the presence of . . . Ayden and Evan . . . , thereby endangering . . . Mark's physical health and safety and placing him at substantial risk of serious physical harm and sexual abuse.
"b-2, d-2, j-2: [Mark's parents] . . . sexually abused . . . Mark's siblings, Ayden and Evan . . . , by engaging in oral copulation with each other in the presence of Ayden and Even [*sic*], thereby endangering the child Mark's physical health and safety and placing him at substantial risk of serious physical harm and sexual abuse.
"b-3, d-3, j-3: [Mark 's parents] . . . sexually abused . . . Mark's siblings, Ayden and Evan . . . by fondling Ayden and Evan's penises and buttocks while they and the children were naked, thereby endangering the child Mark's physical health and safety and placing him at substantial risk of serious physical harm and sexual abuse.
"b-4, j-4: On prior occasions, [father] . . . physically abused the child's sibling Evan with a belt. The father slapped the child and pulled the child's hair. Such physical abuse was excessive and caused the child unreasonable pain and suffering. . . . G. . . . knew of the father's physical abuse . . . and failed to protect the sibling in that the mother allowed the father to reside in the sibling's home and have unlimited access to the sibling. The child's siblings . . . received permanent placement services due to the father's physical abuse of the siblings, Ayden and Evan. The physical abuse of the sibling by the father and the mother's failure to protect the sibling endangers the child's physical health and safety and places child at risk of physical harm, damage, physical abuse and failure to protect.
"b-5, j-5: [Mark's parents] . . . have a history of engaging in violent altercations in the presence of the child's sibling, Evan. The father slapped the mother. The mother failed to protect the sibling in that the mother allowed the father to reside in the sibling's home and have unlimited access to the sibling. The child's siblings . . . received permanent placement services due to the mother and father engaging in violent altercations. The violent conduct by the father against the mother, and the mother's failure to protect the siblings, endangers the child's physical health and safety, creates a

Mark's Detention Hearing and the ICWA

The detention hearing was conducted on September 9, 2014. Father was found to be Mark's presumed father. Mark was detained and placed in Rodriguez's care. The parents were given monitored visitation.

During the hearing, G. claimed Navajo heritage through her biological father. She was unable to provide any details, but said DCFS could follow up with the MGM. Father denied any Native American heritage. The court ordered DCFS to follow up on the potential ICWA matter, and deferred its findings pending completion of that inquiry.[8]

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detrimental home environment, and places the child at risk of physical harm, damage, danger and failure to protect.
"b-6: . . . G. . . . has a 10 year history of illicit drug use . . . as well as numerous drug related convictions. Mother is currently in residential drug treatment. Such substance abuse history on the part of the mother endangers the child's physical health and safety and places the child at risk of physical harm and damage.
"b-7: . . . father . . . has a . . . 15 year history of illicit drug use including cocaine, methamphetamine and marijuana as well as numerous drug related convictions. Father . . . is a current registered drug offender. Such substance abuse history on the part of the mother and father endangers the child's physical health and safety and places the child at risk of physical harm and damage."

[8] After the hearing, DCFS contacted the MGM to obtain additional information and left at least one telephonic message asking her to contact DCFS or have Gennice's father (the maternal grandfather, MGF) do so. Neither the MGM or MGF responded to DCFS's inquiry. The agency did not follow-up, conduct an additional inquiry or provide the requisite notice under the ICWA. By at least January 2015, DCFS had informed the court the ICWA did not apply.

On June 23, 2015, the juvenile court stated that "[n]o information [was] gleaned as to either enrollment or possible enrollment by the parties. Just having a possible history of Navajo does not qualify," and found the ICWA inapplicable.

The matter was set for a jurisdiction hearing.

Forensic Interviews (May 29 and September 16, 2014)

In October 2014, DCFS reported that Ayden and Evan had participated in individual forensic interviews in May and September 2014, conducted by experts investigating the allegations of child abuse from the Children's Advocacy Center for Child Abuse Assessment and Treatment (CAC). In five-year-old Evan's first interview on May 29, 2014, the CAC determined that the child was, for the most part, able to recognize when a person was or was not being truthful. Evan promised to be truthful, but had trouble staying focused. Evan said he had been reprimanded the day before for tickling Ayden's private parts. He claimed G. taught him about tickling private parts, and said it made Ayden laugh to be tickled. Evan said that Ayden told him to touch his private parts and do other bad stuff, but became distracted.

Evan also told CAC that G. had taught him to do "nasty stuff," such as use his mouth on her vagina ("weenie" or "hole") and anus, digitally penetrate her anus, and touch her "chichis." She taught him the word "sexing," but told him not to tell anyone about what she and father had done. He reported that blood and "white stuff" had come out of Gennice's "hole" when he put his finger inside; G. told him she took the blood to drink it. Evan said father was present when Evan touched Gennice's "chichis," and father touched them too.

Evan also told the CAC interviewer that father had pulled his hair, put his finger inside Evan's butt, and struck him on the butt with a belt and told him to laugh. Father also put his mouth on Evan's penis ("weenie") and licked it.

During his second interview in September, Evan told a CAC interviewer that both parents hit him with a belt. He said that G. would always "sex" him, but could not explain what that meant. He said that G. took off her clothes in front of him and told him to suck her "chichis." Evan also reported that father had "sexed" him, which he described as having "put his butt in my weenie," while they were in the bedroom, and then putting Evan's "weenie" in father's butt. Evan told the interviewer that father had "dragged" his hair, which hurt and made him cry.

In his first interview in May, seven-year-old Ayden also established his ability to distinguish between the truth and a lie and promised to be truthful. He understood he was there to talk about the parents having touched him and Evan on their private parts. Ayden got angry when father touched Evan's private parts. Afterwards, the parents went into their room and did "nasty" stuff. Later, they summoned Ayden into their room and told him to remove his clothes so G. could touch him. He said that, throughout this incident, the parents continued to engage in sex (do the "nasty stuff").[9] He said G. put her mouth on his "private part" and licked him while father watched.[10] Then, father called Evan into the room and began licking Evan's private parts. Father told Ayden to touch Gennice's "chichis" and private parts, and instructed Evan to touch Ayden's private parts.

Ayden said the touching happened when he was in kindergarten. He denied that anyone touched his "butt." Like Evan, the first person Ayden

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9 Ayden did not want to say the word "sex" aloud so he wrote it down.

10 Again, Ayden wrote down that G. had "licked" his penis because he did not want to say the word out loud.

told about the sexual abuse was the MGM, who also told him not to tell anyone else.

In his September interview, Ayden told CAC that G. summoned him to her bedroom and made him put his mouth on her "chichis" and suck, put his mouth on her "hole" and to insert his "weenie." She then sent him outside, but father made him come back into the room and inserted his penis (weenie) into Ayden's butt. Ayden said there was blood on the floor when father did this, but he did not stop. When father finished, G. told Ayden to shower and she washed him with a sponge. Ayden said father had inserted his penis into Ayden's anus more than once, and it hurt.

DCFS filed its Jurisdiction/Disposition Report on November 6, 2014. Both parents denied the allegations of sexual abuse, which they claimed Rodriguez had manufactured in order to get all four boys. Rodriguez denied having lied or coached the boys, and claimed she had nothing to gain from doing so. Her own children were grown, and she had not planned on raising four more children, particularly kids with the serious issues displayed by these boys. Still, she vowed to "protect them." She told DCFS the boys came to her on their own to disclose the parents' abuse, and she had simply reported it once it was revealed.[11]

On November 13, 2014, DCFS submitted this statement from the boys' therapist, Dr. Pelayo:

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[11] Apparently, the parents' claims stem, at least in part, from the fact that one of Rodriguez's children was molested by the father of another of her children. This concern also arose because Rodriguez was worried that the first therapist who treated the boys for sexual abuse may have failed to observe appropriate professional boundaries and one of the boys said the therapist put his hand on his knee. She pushed to have DCFS switch to a new therapist and the boys began seeing Dr. Pelayo in August 2014.

> "I have no doubt that some sort of sexual abuse occurred against Ayden and Evan by [the parents]. The children's statements have remained consistent as to the incidents and the occurrences. The children present behavior that is consistent with sexual abuse and trauma. I do not think the alleged abuse occurred only once; there were numerous instances of the abuse; without a doubt the abuse occurred. Even if there was a gross exaggeration to the alleged abuse, there was a traumatic sexual abuse event in which Ayden and Evan were abused. The qualities of their disclosures and specifics are too much to be ignored or think nothing happened to them."

Regarding the parents' steadfast denial of the boys claims of sexual abuse, Dr. Pelayo stated that she had

> "not met or worked with the parents and I [could] understand how some may feel [that] because [he had] only worked with the children [he had] a biased view; however, their statements, stories and recollection of events . . . continues to be consistent. The only thing which may make the children's statements seem inconsistent is their timeline but that is more because they do not have a real sense of time at their ages. Even when their time is off, the retelling of the abuse and the details to which they describe events indicates the abuse occurred."

Finally, in terms of their therapeutic progress, Dr. Pelayo said that

> "Relatively, the boys are doing well in that they are in a stable home and feel safe; however, they display many behaviors including anger, self destruction [*sic*] and agitation at home; luckily they have been reported to been [*sic*] doing well at school and have not displayed much of these behaviors in class as this was a worry. However; [*sic*] the boys do report desires to perpetrate each other but have not expressed any desire to sexually act out toward anyone else."

With regard to the allegations of the parents' drug abuse, G. conceded that she had used methamphetamine "heavily." Father admitted that he had

an extensive drug and criminal history,[12] but said he had been clean for three or four years. He said he took responsibility for the most recent criminal violation because he had not wanted G. to "take the charge because she was pregnant." He insisted he was enrolled in "Prop 36" classes, but declined to drug test when DCFS asked him to do so.

In its section 366.26 and status reports filed on January 9, 2015, DCFS informed the court that Evan and Ashton remained with Rodriguez, but Ayden had to be moved into a group home because of his sexual misconduct with Evan. When they lived in her home, Rodriguez had always kept Ayden and Evan separated because of concerns regarding Evan's aggressive behavior and both boys' sexual acting out. She had installed alarms on their bedroom doors to keep them from entering one another's rooms at night. Ayden disarmed the alarm on Evan's bedroom door, and used his bedroom furniture to access Evan's room. Once inside, he admitted touching his brother's private parts. He also asked Evan to perform oral copulation on him, and Evan agreed. Rodriguez said that, after Ayden left her home, Evan masturbated every day, broke things that could hurt him, and was not allowed to have shoe strings because of concerns he might harm himself. He also hoarded food and over ate. Evan was still not permitted to play with Ashton because his behavior was so aggressive and he would try to hurt him.

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[12] Father was convicted of burglary in 1994 and arrested twice during 2000 for driving under the influence. In 2008, he was sentenced to 16 months in prison for possession of a controlled substance, a felony, and was also arrested in 2009, 2012 and 2014 for possession of a controlled substance. As a result of his 2014 arrest, father told DCFS he was participating in a Proposition 36 outpatient drug treatment program.

Alisha's Case

Alisha's social worker was contacted after Evan claimed she had also been sexually abused by the parents. Alisha denied that she had been sexually abused by anyone. Caroline denied having any concerns regarding sexual abuse. The findings of an October 1, 2014 forensic medical report for Alisha were normal.

In late February 2015, DCFS received a referral stating that Alisha had fallen from a bed she was jumping on and landed on her elbow. She was unable to straighten her arm and was in pain. Caroline claimed Alisha was a drama queen, did not believe her daughter was in pain and refused to take her to a doctor.[13] A social worker interviewed Alisha. The child's arm was stiff, and Alisha complained of pain. Later, Caroline conceded that she had said some mean things to Alisha, and was remorseful. She took Alisha to a doctor; the child's arm was broken.

Alisha said Caroline was a liar, and told the social worker that her mother had hit her on the legs with a belt the week before. She admitted, however, that it had not hurt when her mother hit her with the belt, and also

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[13] Alisha had been a subject of DCFS's attention in the past. In early 2005 the agency had received a referral regarding father's and Caroline's alleged history of domestic violence and substance abuse. When father learned Alisha was about to be detained, he had driven away with Caroline and Alisha and refused to disclose their whereabouts. A petition was filed in April 2005 alleging that father and Caroline had a history of domestic violence and drug abuse. Caroline remained at large with the child for several years. In 2012, Alisha was found in Caroline's care and appeared well cared for and bonded with her mother. Reunification services were provided, but father was unable to resolve his substance abuse issues. The unadjudicated petition was dismissed in January 2013, and Alisha was released to Caroline.

that it had been an unusual thing for Caroline to do. Then and later, Alisha denied that Caroline ever physically abused her. Alisha was not afraid of her mother. Alisha also consistently denied having been inappropriately touched or sexually abused by father or anyone, and said the last time she had seen father was two Decembers before. Neither Alisha or Caroline knew anything about father having abused Ayden or Evan.

On March 12, 2015, DCFS filed a section 300 petition on behalf of Alisha, pursuant to subdivisions (a), (b), (d), and (j), and she was removed from Caroline's custody and placed in foster care.[14]

Father, who had not seen Alisha for two years, made his first appearance in her case on April 30, 2015. At that hearing, he was found to be

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[14] As sustained in May 2015, that petition alleges in pertinent part:
"b-4, d-2: . . . [Father] engaged in sexual intercourse and oral copulation in the presence of unrelated children . . . and . . . fondled [the children] . . . . Such conduct by [father] endangers Alisha's physical health and safety and places her at substantial risk of serious physical harm and sexual abuse.
"b-5: On prior occasions, [father] physically abused . . . unrelated child[ren] . . . by striking [them] . . . with belt[s, and] . . . father slapped and pulled [one] . . . child's hair. . . . Such physical abuse was excessive and caused the unrelated children unreasonable pain and suffering. The physical abuse of the unrelated children by the father endangers [Alisha's] physical health and safety and places [her] at risk of serious physical harm, damage, danger and physical abuse.
"b-6: [Father] has a fifteen year history of substance abuse . . . which renders [him] incapable of providing [Alisha] with regular care and supervision. The father's history of illicit drug abuse endangers the child's physical health and safety and places the child at risk of serious physical harm and damage.
"b-7: [Father] and [his] female companion . . . have a history of engaging in violent altercations. On prior occasions, the father slapped the female companion. The father's violent conduct endangers the child's physical health and safety and places the child at risk of serious physical harm, damage and danger."

her presumed father and given monitored visitation. The matter was continued to May 6, 2015, for a trial-setting conference. Thereafter, the cases involving Mark and Alisha were consolidated.

Adjudication Hearing

1. *The Court Finds the Boys Unqualified/Unavailable to Testify*

The adjudication began on May 11 and was concluded May 13, 2015. The juvenile court found Evan not qualified to testify due to his inability to distinguish the truth from a falsehood. Ayden was initially deemed qualified to testify, but the court later declared him an unavailable witness after he became extremely upset when asked substantive questions, cried profusely and said he "did not want to remember anything anymore," or answer any more questions.[15]

2. *Rodriguez's Testimony*

Rodriguez testified that she first noticed sexualized behavior between Evan and Ayden shortly after they were placed in her home, and often found them in bed together at night. She was unable to pinpoint exactly when Evan first disclosed that Ayden had touched him inappropriately, or when either boy said father had similarly touched them. She recalled that she made a referral to DCFS regarding the initial disclosures of sexual abuse, which DCFS closed as inconclusive. Within a month, however, she had made another referral based on new details of sexual abuse the boys had disclosed. Rodriguez bought notebooks for Evan and Ayden to write in because they

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15 The minute order incorrectly indicates the court found both boys unqualified to testify.

were revealing so many details, and she wanted them to be able to take the journals to their therapist to discuss the issues.

Rodriguez testified that she considered Ashton to be a part of her family, but not her child, and denied that she was worried that G. would reunify with him. Rodriguez had known G. since Ayden was three months old, and saw her often because G. was the manager of Rodriguez's apartment. Rodriguez testified that her oldest daughter had been molested by her youngest daughter's father. Rodriguez had sought to change the boys' therapist after they told her their therapist put his hand on their knee and said, "It is okay. I am your friend." She did not believe the therapist had any business touching a child.

3. *Rosalinda's Testimony*

Rosalinda testified that the first time Evan spoke to her about sexual abuse was in December 2014, when he said his mommy had "sexed" him. At first she thought he said G. "texted" him, and questioned him because Evan did not have a cell phone. But Evan said, "No. Mommy sext me." Ayden revealed the sexual abuse by telling her that father "was touching his weenie."

Beginning in February 2015, Rosalinda decided that the boys needed to record what they were telling her in a journal because she "felt in [her] spirit that . . . nobody would believe such a thing. So [she] had them write it down." She never told either child what to say. She recorded Evan's statements as he told her the stories. She "wanted to give him a voice because he couldn't write it." She testified that Evan seemed sad when he told her what had happened. They did not discuss the sexual abuse all the time; sometimes they went a day, a week and sometimes longer without mentioning it.

4. *Father's Testimony*

Father testified that he began living with Ayden and Evan in March 2013. He denied that the boys had ever witnessed him having sex with G., and denied summoning them into the parents' bedroom or sexually abusing either boy. He drank beer every night, but had never given any to Evan or Ayden. He testified that the boys never met Stella, and only met Alisha twice.

Father acknowledged that he and G. had argued and pushed one another, but denied that the police ever came to his house to investigate calls regarding domestic violence. He admitting that Ayden saw him push G., but said he misinterpreted what happened. He also admitted that he and G. took "swings at each other" during an argument, but he did not mean to hit her. Father conceded that he used a belt to hit the boys, but denied that the punishment was excessive or that he had beat them. He used the belt as a "last resort" and said that, "under the circumstances that [the boys] were being disciplined for, [he] believe[d] that it was called for." Usually, he disciplined the boys with "time-outs," talking to them or taking toys away.

Father admitted that he had a lengthy history of substance abuse, including marijuana, "crystal meth" and cocaine. He denied using drugs when the boys lived with him. He said he was arrested in June 2014 for marijuana use, and claimed he had not used drugs for over a year before the hearing.

5. *Father's Expert Witness*

Father called psychologist Mitchell Eisen, an expert in "suggestibility and coaching" to testify. Dr. Eisen, has conducted research regarding

forensic interviews and coaching issues, and how they may affect the memory of children in cases of alleged sexual abuse. In preparation for his testimony, Dr. Eisen reviewed DVDs of the boys' forensic interviews, and most of DCFS's case reports.

Dr. Eisen testified that there is no definitive single sign or symptom that will confirm whether sexual abuse occurred. The fact that a child engages in sexual acting out behavior is no longer telling because there are many ways (internet, television, phones, etc.) that children may be exposed to pornography and learn such behavior without also having had a sexual experience with an adult or another child. Dr. Eisen testified that Evan and Ayden were repeatedly questioned by Rodriguez about being sexually abused. She was concerned about them licking each other's ears and masturbating, and was afraid their first therapist might be sexually abusing the boys, and repeatedly asked them about it.

Dr. Eisen opined that repeated questioning of a child in a suggestive manner may lead to false reports because the person will infer that an event which did not occur actually took place, which could cause a memory change. This is a particularly dangerous phenomenon in young children who have difficulty recalling where their information came from (so-called "source monitoring"). Dr. Eisen opined that repeated suggestions of a non-event, particularly by a trusted caregiver—such as Rodriguez here, whom the boys like and respect—can be particularly influential and might lead a child to undergo a genuine memory change in which he comes to believe a narrative account of something untrue. Dr. Eisen also opined that asking one to rethink a memory, and repeatedly going over it could lead to coherent, detailed false memories which the speaker believed and the truth or falsity of

which others could not ascertain. The level of detail provided by a speaker is not indicative of truth or falsity of a memory.

6. *The Court's Findings*

After closing arguments, the juvenile court observed that the boys had exhibited "enormous amount of inappropriate sexual behavior," far beyond what could reasonably be characterized as "normal exploratory child behavior." And, although Evan and Ayden were, perhaps, not "completely accurate historians," in their accounts of what transpired between the parents and each of them, the court did "believe that [the children] were sexually abused," and exposed to a great deal of sexual behavior between the parents, whom the court believed were using drugs when they committed the sexual abuse. The court dismissed the allegations of sexual abuse as to Alisha, sustained both petitions, as amended, and continued the matter for a disposition hearing.

7. *The Disposition Hearings*

Disposition hearings were conducted for Alisha and Mark on June 22 and 23, 2015. As to Alisha, the court awarded father reunification services, declared her a juvenile court dependent, removed her from parental custody and placed her in foster care.

As to Mark, the court found he faced substantial danger if returned to his parents' care, and that there were no reasonable means to protect him short of removal. Mark was removed from parental custody. Father was awarded reunification services, ordered to participate in a drug and alcohol

treatment program, random drug testing, domestic violence and parenting courses, and individual and sexual abuse counseling. Father appeals.[16]

DISCUSSION

Father appeals the juvenile court's jurisdictional and disposition orders as to Mark and Alisha. He insists there is no substantial, reliable evidence to support the court's findings that he physically or sexually abused Mark's half-brothers or that his history of drug abuse placed either of his children at risk. Father also argues that the juvenile court erred in concluding the ICWA did not apply as to Mark. Finally, he maintains there is insufficient evidence to support the court's disposition order removing Mark from his custody.

I. *Sufficient Evidence Supported the Jurisdictional Findings as to Father*

Father maintains there is insufficient evidence to support the findings that he sexually abused Evan or Ayden, which findings in turn were used as part of the bases for the exercise of juvenile court jurisdiction over Mark and Alisha. He also contends there was no substantial evidence demonstrating that either child was at risk of serious physical harm or sexual abuse.

A. *Standard of Review*

"'In reviewing a challenge to the sufficiency of the evidence supporting the jurisdictional findings and disposition, we determine if substantial

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16 DCFS filed, but dismissed, a cross-appeal.

evidence, contradicted or uncontradicted, supports them. "In making this determination, we draw all reasonable inferences from the evidence to support the findings and orders of the dependency court; we review the record in the light most favorable to the court's determinations; and we note that issues of fact and credibility are the province of the trial court." [Citation.] "We do not reweigh the evidence or exercise independent judgment, but merely determine if there are sufficient facts to support the findings of the trial court. [Citations.] "'[T]he [appellate] court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence . . . such that a reasonable trier of fact could find [that the order is appropriate].'"'" (*In re I.J.* (2013) 56 Cal.4th 766, 773 (*I.J.*); *In re Lucero L.* (2000) 22 Cal.4th 1227, 1249–1250 (*Lucero L.*).)[17] Evidentiary conflicts and conflicts between reasonable inferences are resolved in favor of the prevailing party. (*In re Ricardo L.* (2003) 109 Cal.App.4th 552, 564.) The juvenile court's decision, "if correct, will be upheld even if the stated reasons for the decision are erroneous or incomplete." (*Lucero L.*, *supra,* 22 Cal.4th at pp. 1249–1250.) As appellant, father bears the burden to demonstrate there is insufficient evidence to

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17 As a general rule, a single jurisdictional finding supported by substantial evidence is enough to support juvenile court jurisdiction and render moot a challenge to other findings. (*In re Alexis E.* (2009) 171 Cal.App.4th 438, 451.) However we agree with father that it is appropriate to exercise our discretion and entertain the merits of the appeal, especially because the findings of sexual abuse in particular are pernicious, carry a stigma and may prejudicially impact this or future dependency proceedings. (See *In re M.W.* (2015) 238 Cal.App.4th 1444, 1452.) "Further, 'refusal to address . . . jurisdictional errors on appeal . . . has the undesirable result of insulating erroneous or arbitrary rulings from review.' [Citation.] For these important reasons, we review [father's] appeal on the merits." (*Ibid.*)

support the court's findings and orders. (*In re Jordan R.* (2012) 205 Cal.App.4th 111, 136.)

B. *Controlling Law re Allegations*

Father challenges the sufficiency of the evidence supporting the findings he physically and sexually abused Evan and Ayden, and engaged in domestic violence and illicit drug use with G. Those findings formed the bases for exercising juvenile court jurisdiction as to Mark under section 300, subdivisions (b), (d) and (j), and as to Alisha under section 300, subdivisions (b) and (d). Father maintains there is insufficient evidence to support a finding that his actions placed either child at risk of sexual abuse or harm, let alone serious physical harm.

The juvenile court may not sustain an allegation unless DCFS has shown, by a preponderance of the evidence, that a child is a dependent of the court under the relevant subdivisions of section 300. (*I.J., supra,* 56 Cal.4th at p. 773; § 355, subd. (a); § 342.) A parent's past conduct may be probative of the current risk posed to a child if there is reason to believe the conduct will continue. (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 824.) A child need not suffer actual harm in order for the court to assume jurisdiction. (*I.J., supra*, 56 Cal.4th at p. 773.)

As relevant here, section 300, subdivision (b)(1), permits the juvenile court to assert jurisdiction over a child who is or is at risk of suffering serious physical harm as a result of a parent's failure or inability to supervise or protect the child. A parent's sexual abuse of a child constitutes sufficient grounds for a juvenile court to find the parent poses a risk of serious physical harm to the child. (*In re Kieshia E.* (1993) 6 Cal.4th 68, 76-77.)

Under section 300, subdivision (d), a court may assert jurisdiction

over a child who is at substantial risk of sexual abuse (as defined at Pen. Code, § 11165.1), by his or her parent or a member of the household, or where the parent knew or should have known about the sexual abuse, but failed to protect the child.[18]

In a case such as this, involving physical, sexual and drug abuse, jurisdiction is warranted under section 300, subdivision (j), if the child's sibling has been abused and there is a substantial risk the child will also be abused. The criteria used to determine whether a child is described by section 300, subdivision (j), include the circumstances surrounding and the nature of the sibling abuse, the child's age and gender, the mental condition of the parent, and other factors the court deems relevant, viewing the circumstances in their totality. (*I.J., supra*, 56 Cal.4th at p. 774.) The application of subdivision (j) is not "limited to the risk that the child will be abused or neglected *as defined in the same subdivision* that describes the abuse or neglect of the sibling. Rather, subdivision (j) directs the trial court to consider whether there is a substantial risk that the child will be harmed under subdivision (a), (b), (d), (e) *or* (i) of section 300, notwithstanding which of those subdivisions describes the child's sibling." (*In re Maria R.* (2010) 185 Cal.App.4th 48, 64, disapproved on another ground by *I.J., supra*, 56 Cal.4th at p. 778–779, 781.)

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[18] Sexual abuse includes "[t]he intentional touching of the genitals or intimate parts [including the genital area and buttocks] . . . of a child, . . . for purposes of sexual arousal or gratification." (Pen. Code, § 11165.1, subd. (b)(4).) Sexual abuse also includes "annoy[ing] or molest[ing] any child," and "any lewd or lascivious act . . . upon or with the body . . . of a child who is under the age of 14 years" for sexual arousal or gratification. (Pen. Code, §§ 647.6, subd. (a)(1), 288, subd. (a).)

C. *The Record Contains Sufficient Evidence to Support Sustaining Allegations of Sexual Abuse of Evan and Ayden*

Father contends that the court erred by admitting into evidence, and relying exclusively upon Evan's and Ayden's out–of–court hearsay statements regarding sexual abuse to support its findings, without first making a specific determination "whether or not this hearsay evidence had special indicia of reliability and was therefore admissible." He also maintains that, even if the court had attempted to do so, the court could not have made such a finding on this evidentiary record, because the hearsay statements were not reliable, were suspect and may have been made as a result of Rodriguez's influence. Accordingly, because the boys' hearsay allegations lacked sufficient indicia of reliability, and there was no other evidence to support a finding of sexual abuse, father contends the evidence was insufficient to support jurisdiction under section 300, subdivision (d). (*Lucero L., supra*, 22 Cal.4th at p. 1243.) We disagree.

Hearsay evidence contained in a DCFS social study report is generally admissible and constitutes competent evidence upon which a finding of dependency jurisdiction may be based. (§ 355, subds. (a), (b).) However, if the declarant does not satisfy certain statutory criteria, and a party asserts a timely objection to the admission of specific hearsay evidence contained in a social study, that hearsay evidence "shall not be sufficient *by itself* to support a jurisdictional finding or any ultimate fact upon which a jurisdictional finding is based," unless the agency establishes that one of several exceptions applies. (§ 355, subds. (a), (b), (c)(1)(A) [hearsay would be admissible in any civil/criminal action under any exception to the prohibition against hearsay], (c)(1)(C) [hearsay declarant is a peace officer, health practitioner, social

worker or credentialed teacher]; *In re B.D.* (2007) 156 Cal.App.4th 975, 986, italics added.)[19]

In *Lucero L.*, the California Supreme Court considered whether section 355 controls if a hearsay statement comes from a minor deemed incompetent to testify because he lacks the capacity to distinguish between truth and falsehood. The Court held that, in such a case, section 355 notwithstanding, due process concerns require that the juvenile court find that "'the time, content and circumstances of the statement provide sufficient indicia of reliability'" if the statement forms the *sole* basis for sustaining jurisdiction over the minor. (*Lucero L., supra*, 22 Cal.4th at p. 1248.) So long as the child's hearsay statements are deemed sufficiently reliable, no corroborating evidence is required. (*Id.* at pp. 1248–1249; see *In re April C.* (2005) 131 Cal.App.4th 599, 610, fn. 5.) Under *Lucero L.*, the boys' hearsay statements are admissible, whether or not corroborating evidence exists, if they are sufficiently reliable, i.e., if the time, content, and circumstances of the statements provide sufficient indicia of reliability. (*Id.* at pp. 1242, 1246.)

Father insists reversal is in order because the juvenile court failed to make a specific finding that "'the time, content and circumstances of [the boys'] statement[s] provide[d] sufficient indicia of reliability.'" (*Lucero L., supra*, 22 Cal.4th at p. 1248.) Father's contention fails.

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19 G. timely objected to the court's consideration of the hearsay evidence at issue.

The parties properly agree that the hearsay exception contained in section 355, subdivision (c)(1)(B), does not apply to the out-of-court statements made by Ayden and Evan, because they were not subjects of the section 300 petitions filed in the underlying dependency action at issue here. Section 355, subdivision (c)(1)(D), which provides an exception if the "hearsay declarant is available for cross-examination," is also inapplicable for obvious reasons.

First, in a case such as this in which the court stated it was not relying on the children's hearsay statements as the exclusive basis for its jurisdictional findings, we find nothing in *Lucero L.* that requires the court to make explicit findings that the circumstances provide sufficient indicia of reliability in order to consider the statements. Second, father's arguments to the contrary notwithstanding, we find that the juvenile court properly determined that the content and circumstances of the children's statements showed sufficient indicia of reliability and that the jurisdictional findings were supported by substantial evidence.

Lucero L. modified the requirements of its predecessor, *In re Cindy L.* (1997) 17 Cal.4th 15 (*Cindy L.*), in which our Supreme Court held that, to be admissible, out-of-court statements such as those at issue here, must have *both* indicia of reliability and corroboration. (*Lucero L., supra*, 22 Cal.4th at pp. 1248-1249.) The Court in *Lucero L.* concluded that no corroboration is required under section 355, if a statement contains sufficient indicia of reliability. (*Id.* at p. 1247.) Conversely, "[e]ven without special indicia of reliability, the minor's hearsay statements, *if corroborated by other evidence*, *would be sufficient to support a jurisdictional finding*." (*Ibid.*, italics added.)

Here, Rodriguez testified that she began to notice both boys engaging in sexualized behavior shortly after being placed in her home. That behavior subsided for a time, but later increased in intensity to the point that she had to keep Evan and Ayden physically separated at all times, and to install alarms on their bedroom doors to try to keep them out of one another's rooms at night. Rodriguez believed the boys' disclosures to her began in December 2014, when Evan first reported that his mother had "sexed him," and soon thereafter said father touched his "weenie." Rodriguez and DCFS reports indicated that the boys continued making disclosures to Rodriguez and her

mother, with new and increasing amounts of detail, which Rodriguez continued to relay to DCFS.

The evidence before the court also included Dr. Pelayo's unequivocal opinion that her patients had been sexually abused by the parents, even though she acknowledged some of their disclosures might contain some "gross exaggeration[s]." Dr. Pelayo observed that the "qualities of [the boys'] disclosures and specifics [were] too much to be ignored or [to] think nothing happened to them." Even Dr. Eisen never opined that Ayden and Evan had not actually been victimized by the parents. The corroborating evidence that the boys were sexually abused was pervasive and compelling. Accordingly, the court's jurisdictional finding that the boys were sexually abused finds substantial evidentiary support. (*Lucero L., supra*, 22 Cal.4th at p. 1247.)

In addition to this corroborating evidence, the boys' repeated statements to numerous people were independently reliable. Two primary indicia of reliability are spontaneity and repetition. (*Cindy L., supra*, 17 Cal.4th at pp. 29–30; *Lucero L., supra*, 22 Cal.4th at pp. 1239, 1246–1247.) The record reflects that the boys told virtually the same story independently and consistently to several people over the course of months, including a social worker, their therapist, and police and forensic investigators. It is reasonable to conclude these individuals were reliable witnesses with no motive to fabricate evidence. There is no indication that any of these professionals doubted the boys' claims of sexual abuse. Indeed, Dr. Pelayo said she had "no doubt that some sort of [traumatic] sexual abuse occurred against [the boys] by" the parents on numerous occasions, a sentiment echoed by the officer who prepared the PPD report and observed that it was "obvious that [Ayden was] affected by these incidents."

We also reject father's claim that the juvenile court found the boys' statements categorically unreliable. Although the court readily acknowledged that these adolescents were not "completely accurate historians," such that it could not find that any particular claimed act had occurred, the court was undeniably convinced that the boys exhibited an "enormous amount of inappropriate sexual behavior," far beyond what one would consider "normal exploratory child behavior," and had no difficulty at all "believ[ing] that they were sexually abused."

We conclude that substantial evidence supports the court's finding that the boys were sexually abused, and that abuse placed Mark and Alisha at risk of similar abuse.

D. *Physical Abuse*

Father argues that there is no substantial evidence that Mark or Alisha was at risk of suffering physical harm at his hands, let alone serious physical harm. The juvenile court concluded the evidence indicated otherwise, and that Alisha and Mark faced a substantial risk of harm as a result of father's physical abuse of Evan and Gennice's failure to protect Evan, or her other children from that abuse. We agree.

The court sustained allegations (as to both Mark and Alisha), that father struck Evan with a belt, slapped him and pulled his hair and that G., with whom father presumably still lives, did nothing to protect her son from the physical abuse he suffered at the hands of her companion. (§ 300, subd. (b)(1), (j).) According to the boys, father hit Evan on his buttocks, legs, arms and stomach area, pulled his hair and slapped him.

Father admits having disciplined Evan with a belt, but argues that he never beat the boy and that Evan displayed no physical signs of serious harm

or injury. Father sees nothing wrong with having used a belt to discipline his companion's child, and said he only did so as a last resort. Even if father did employ the belt as a method of discipline, he never explained the serious transgression a four–year-old committed to deserve this extreme punishment, why a less harsh form of punishment was inadequate, or why it was necessary that the child be hit all over his body. Nor is there any explanation, let alone justification, for father slapping Evan or pulling his hair. Such outrageous conduct provides no reason to believe that two–year-old Mark or 10–year-old Alisha will face any less risk of suffering serious physical harm at father's hands, or any greater protection from Gennice.

In re D.M. (2015) 242 Cal.App.4th 634, considered what constitutes "reasonable parental discipline." The court applied a three-part test to determine whether a parent's conduct exceeded the scope of his or her right to discipline: (1) whether the conduct is genuinely disciplinary; (2) whether the punishment is necessary, meaning discipline warranted under the circumstances; and (3) whether the degree and amount of punishment was reasonable or excessive. (*Id.* at p. 641.) Evan's statements suggest father may have used the belt for disciplinary reasons. However, there is no explanation for what caused father to slap Evan or pull his hair, and it is hard to imagine such conduct could be characterized as discipline, let alone what a four–year–old could have done to deserve that level of force. We agree with DCFS that, even if father had offered an explanation for disciplining Evan's behavior (he did not), "beating a four–year–old boy with a belt, slapping him, and pulling his hair is never warranted under any circumstances and father's conduct in doing so was excessive." Accordingly, assuming he was within his rights to discipline the child at all, father's

conduct fell outside the scope of a parent's right to administer reasonable discipline.

There is also no merit to father's argument that the court erred because there is no evidence that the "physical discipline" used against Evan caused serious physical harm. Father continues to believe he did nothing wrong, and G. has denied that father physically abused Evan. The dependency court "need not wait until a child is seriously abused or injured to assume jurisdiction." (*In re N.M.* (2011) 197 Cal.App.4th 159, 165.) The fact that Evan did not show visible signs of having been beaten or other injuries due to father's excessively forceful conduct did not prevent the court from asserting jurisdiction as to him, or as to Mark and Alisha once it concluded they too faced an unreasonable risk of harm. So long as father and G. continued to deny the risks posed by their behavior, Alisha and Mark remained at risk of harm absent court intervention. (See *In re Esmeralda B.* (1992) 11 Cal.App.4th 1036, 1044 [denial is a relevant factor to consider in determining whether someone is likely to modify his or her future behavior without court supervision].)

E. *Substantial Evidence Supports the Findings as to Domestic Violence*

We reject father's assertion that there was insufficient evidence to sustain the allegations of domestic violence. Domestic violence in the home where a child resides is neglect, and the failure of a parent to protect a child from the substantial risk of encountering domestic violence places that child at risk of harm. (See § 300, subd. (b)(1); *In re Heather A.* (1996) 52 Cal.App.4th 183, 194-195; *Guardianship of Simpson* (1998) 67 Cal.App.4th

914, 939 ["Domestic violence is always a serious concern" of significant relevance to a child's welfare].)

The record contains sufficient evidence to support the court's jurisdictional findings regarding the risks posed by the domestic violence between father and G. First, father's argument that the boys' hearsay statements regarding his acts of domestic violence are not corroborated by any other evidence is contradicted by the record, and ignores the fact that the court sustained equivalent allegations as to the petition filed on behalf of the boys, after they reported domestic violence. He also ignores Alisha's statement that, during an overnight visit with father when she slept on the couch beside father's bedroom, she "heard [him] start arguing with [Gennice] and [heard him] hit her." Alisha told the social worker she had not seen father hit G. but she was confident, and "could tell that [father] hit [Gennice] first." Further, father himself concedes that he and G. took "swings" at each other during an argument, and that Ayden saw him push her against the sink during another argument, although he claimed the child–who also said father punched his mother in the stomach with a closed fist on the same occasion–misinterpreted what he saw. The record contains ample corroborating evidence to support the boys' hearsay statements regarding father's acts of domestic violence. The court was justified in sustaining the domestic violence allegations.

F. *Substantial Evidence Supports the Findings as to Father's Substance Abuse*

We reject father's assertion that there is no demonstrated nexus between his admittedly lengthy history of drug abuse and any current

inability or failure to adequately supervise or care for Mark, or that his drug use placed either of his children at risk of harm.

First, Father admitted at the jurisdictional hearing to over a decade of illicit drug use, including marijuana, crystal methamphetamine and cocaine, for which he has been subjected to multiple arrests and imprisonment. That drug use apparently continued unabated until two months before Mark was born, when father was arrested after police found a scale and methamphetamine during a probation sweep at his home. His only explanation for that arrest was that he showed "a lack of judgment [by] having the drug[s] in his house." He never explained why the drugs were there in the first place. In 2014, father was also required to register as a narcotics offender. And, by the time of the adjudication hearing, father had not completed a drug treatment program.

Father asserts that his history of substance of abuse is just a thing of the past. However, the only evidence that this may be true came in the form of his self-serving testimony, which the court found suspect. Father's argument invites us to reweigh the evidence. That is not our function. (*In re M.W., supra*, 238 Cal.App.4th at p. 1453.)

Finally, we note that the court found that father was using drugs when he and G. sexually abused the boys. That conclusion may well have contributed to such conduct. There is no question that Mark and Alisha face a similar risk of harm if father's substance abuse continues unabated.

II. *Mark's Removal from Father's Custody*

Before a juvenile court may order a child removed from parental custody, it must find by clear and convincing evidence that there is, or would be, substantial danger to the "physical health, safety, protection, or physical

or emotional well-being of the minor if the minor were returned home." (§ 361, subd. (c)(1).)

For the same reasons discussed above by which we conclude that substantial evidence supports the jurisdictional findings, the dispositional order removing Mark from father's custody was also correct. Father either denies or minimizes the sustained allegations, and has not yet fully addressed or completed any educational or treatment programs to address the behaviors that place Mark at risk of substantial danger. (*In re Gabriel K.* (2012) 203 Cal.App.4th 188, 197.) Father's failure to acknowledge, address or accept responsibility for the conduct that led to dependency jurisdiction here endangers Mark's safety and necessitates an out–of–home placement.

III. *ICWA*

If the juvenile court knows or has reason to know a child may be an Indian child, notice must be sent to the appropriate tribes or, if their identity is unknown, the appropriate federal agency. (25 U.S.C. § 1912; § 224.2, subd. (a); *In re Jonathan D.* (2001) 92 Cal.App.4th 105, 110.) The juvenile court and DCFS have an obligation to inquire as to whether a child who comes before the court is or may be an Indian child. (§ 224.3, subd. (a).) ICWA notice provisions are strictly construed (*In re Francisco W.* (2006) 139 Cal.App.4th 695, 703), and failure to provide the requisite notice requires us to invalidate actions taken in violation of the ICWA and remand the matter unless a tribe has participated in or expressly indicated it has no interest in the action. (*In re Jonathan D., supra*, 92 Cal.App.4th at p. 110.)

Here, G. indicated she has Navajo ancestry at the detention hearing, but said DCFS would need to follow up with the MGM to get details. DCFS made little effort to gather information. Thereafter, on June 23, 2015, the

juvenile court found the ICWA did not apply. However, without an adequate inquiry, and notice to the appropriate tribes, the court prevented any applicable tribe from determining whether Mark is an Indian child within the meaning of the ICWA. That was error. (See *In re Desiree F.* (2000) 83 Cal.App.4th 460, 469.)

A violation of the ICWA notice requirements does not constitute jurisdictional error and reversal of the jurisdiction findings and disposition orders unrelated to ICWA notice is not required. (*In re Damian C.* (2009) 178 Cal.App.4th 192, 199-200.) Accordingly, a limited remand is in order as to Mark.

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DISPOSITION

The orders sustaining the section 300 petitions and removing Mark from father's custody are reversed and that portion of the case is remanded to the juvenile court with directions to order DCFS to further investigate Mark's claimed Navajo ancestry. Thereafter, the court shall make a finding whether the ICWA applies and direct that notice be given to the appropriate tribe. If, after proper notice, a tribe determines Mark is an

Indian child as defined by the ICWA, the juvenile court shall proceed in conformity with the provisions of the ICWA. If no tribe indicates the child is an Indian child, the court shall reinstate the orders on the section 300 petition. In all other respects, the juvenile court's orders are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, Acting P. J.

We concur:

MANELLA, J.

COLLINS, J.